

IN THE
COURT OF APPEALS OF INDIANA



IN THE MATTER OF THE ADOPTION OF)
INFANTS H.,)

MARION COUNTY DIVISION OF)
CHILDREN'S SERVICES,)

Appellant,)

vs.)

STEPHEN MELINGER,)

Appellee.)

CAUSE NO. 29A02-0611-CV-1018

ORDER

Indiana Newspapers, Inc. d/b/a The Indianapolis Star ("the Star"), by counsel, has filed a Request for Evidentiary Hearing Under Admin. R. 9(I)(2) and a Reply in Support of its Verified Petition for Access to Judicial Records. Appellee Stephen Melinger, by counsel, has filed a Response to the Star's Petition for Access to Judicial Records and a Motion to Seal File/Motion That Further Pleadings Be Filed Under Seal.

I. Background

Stephen Melinger, a resident of New Jersey, contracted with a South Carolina woman, who agreed to give up her infants to him for adoption. Melinger and the mother formalized their surrogacy agreement through a Monrovia, Indiana company. The children, twin girls, were born on April 8, 2005, at Methodist Hospital in Indianapolis. Subsequently, Melinger initiated adoption proceedings with the trial court. The trial court adjudicated and approved Melinger's adoption petition without objection from the Mother.

Subsequently, Appellant Marion County Division of Children's Services ("MCDCS") opened an investigation and a court case in Marion County pursuant to Indiana's CHINS statutes. The children were placed in foster care pending completion of the child welfare investigation. While the Marion County case was pending, the judge erroneously opened the court's file to the public. As a result, the Star published several articles about the case, in which the names of Mr. Melinger, the children, and the children's mother were made public, as well as the details of the surrogacy arrangement.

Subsequently, the judge recused herself, and the Marion County case was transferred to Judge Theodore M. Sosin. With the consent of all of the parties, Judge Sosin withdrew the court's file from public access.

Based on the Marion County investigation, the trial court reopened Melinger's adoption case and appointed a Hamilton County guardian ad litem for the children. The Marion County child welfare case was transferred to Hamilton County and consolidated with the adoption case over the objections of MCDCS. After further proceedings, the trial court reapproved Melinger's adoption petition. MCDCS is appealing the trial court's ruling.

On January 12, 2007, the Star submitted to the Honorable Kevin Smith, Clerk of this Court, a written request for access to this Court's file on this case. On January 17, 2007, Clerk Smith, in a letter, denied the Star's request for access and invited the Star to petition this Court for access pursuant to Ind. Admin. R. 9(I). The parties then filed the pleadings identified above.

II. Applicable Statutes and Rules

This case concerns adoption and child welfare proceedings. Pursuant to Ind. Code § 31-19-9-1, the following court documents in adoption proceedings are confidential:

- (1) A petition for adoption.
- (2) Reports of the investigation made under IC 31-19-8-5 (or IC 31-3-1-4 before its repeal).
- (3) All other papers filed in connection with a petition for adoption.
- (4) The record of evidence of the hearing.

- (5) The decree made and entered by the court, including decrees in foreign adoptions filed under IC 31-19-28 (or IC 31-3-1-10 before its repeal).

In addition, the General Assembly clarified that in this context, keeping documents confidential means that they shall be kept in the custody of the clerk of the court and shall not be open to inspection. *See* IC § 31-19-19-1(b).

The Indiana Supreme Court has explicitly accepted the mandate of IC § 31-19-19-1 because it has included adoption records in a list of case records that are excluded from public access and kept confidential. *See* Ind. Appellate Rule 9(G)(1)(a)(i). Nevertheless, the Indiana Supreme Court has also created a procedure by which the public can gain access to records that are otherwise excluded from public access pursuant to Admin. R. 9(G). A party can view the record if the party submits to the court a verified written request that demonstrates that:

- (a) Extraordinary circumstances exist which requires deviation from the general provisions of this rule;
- (b) The public interest will be served by allowing access;
- (c) Access or dissemination of the information creates no significant risk of substantial harm to any party, to third parties, or to the general public, and;
- (d) The release of information creates no prejudicial effect to on-going proceedings, or;
- (e) The information should not be excluded for public access under Section (G) of this Rule.

See Admin. R. 9(I)(1).

The court to which a verified written request for access is submitted may deny the request without a hearing, or it may hold a hearing, after which the court may grant the requestor access to the records if the requestor demonstrates by clear and convincing evidence that the requirements of Admin. R. 9(I)(1) have been satisfied. *See* Admin. R. 9(I)(2).

This Court has not previously received a request for access to records pursuant to Admin. R. 9(I). We have considered Admin. R. 9(I)(2)'s provision that this Court may deny without a hearing a request to provide access to records, and we conclude that in

order to obtain a hearing, the requestor shall present in its verified written request a prima facie showing that the request satisfies the requirements of Admin. R. 9(I)(1).

III. The Star's Request for Access

In support of its request for a hearing and for access to this Court's file on this appeal, the Star alleges that extraordinary circumstances exist that require deviation from the confidentiality requirements. Specifically, the Star contends that the public has a right to know about potential dangers to children in surrogacy adoptions such as the one here. Furthermore, the Star asserts that the General Assembly was working on a bill addressing surrogacy arrangements. Because of the legislative and public attention that has been focused on this case, and this issue, the Star contends that this Court should deviate from the confidentiality requirements.

We disagree. Adoption cases are confidential to protect children and families from public exposure and to allow the child welfare agencies to investigate adoption petitions. Public interest in, and legislative action on, surrogacy and adoptions do not provide extraordinary circumstances for opening a particular adoption case file to the public. The General Assembly can perform the necessary investigations and policymaking deliberations without access to the specific details of these children's lives. Furthermore, the Marion County court's initial decision to open its case file to the public was erroneous, and we decline to compound that error. The Star has failed to make a prima facie showing that extraordinary circumstances exist that require deviation from the confidentiality requirements.

The Star further contends that access to and dissemination of the information in this case creates no significant risk of substantial harm to any party, to third parties, or to the general public. Specifically, the Star notes that it has already published several articles discussing the details of this case, and that there is no reason to believe that additional public discussion would create any danger to the parties. The Star also asserts that the children now live in New Jersey and would not be harmed by disclosure of these records in Indiana.

We disagree. The children in this case have already erroneously had their names and the details of their lives made public, and continued publication of the details of their lives based on information in this Court's file further infringes upon the privacy to which this family is entitled. Furthermore, the children's residence in New Jersey is immaterial. The Indianapolis Star is a widely circulated newspaper and posts its stories on the Internet. In this Internet age, information on the Internet is widely distributed. Thus, the Star has failed to show that there is no significant risk of substantial harm to the children.

Furthermore, the Star has failed to show that there is no significant risk of substantial harm to the general public. Adoption records are generally kept confidential in order to ensure that the privacy of the children, adoptive parents and birth parents is protected. Releasing information on an adoption case, even one in which some details have already been made public, may have a chilling effect on adoptions. Consequently, opening the file in this case may pose a significant risk of substantial harm to the general public.

In summary, the Indianapolis Star has failed to present a prima facie case as to subsections (a) and (c) of Admin. R. 9(I)(1). Because a party seeking access to records under that rule must demonstrate that all four subsections apply, we need not address subsections (b) and (d). The Indianapolis Star is not entitled to access this Court's records on this case.

IV. Melinger's Motion to Seal File/Motion That Further Pleadings Be Filed Under Seal

In support of his request that this Court seal its file, Melinger asserts that the Star is improperly mentioning confidential information about this case in its stories, and that the continued release of this information harms the children that are at issue. Consequently, Melinger concludes, this Court's file should be sealed to prevent further harm.

Because this Court's file is already withheld from public access pursuant to Admin. R. 9(G)(1)(a)(i), we decline further action.

V. Conclusion

Having reviewed the matter, the Court FINDS AND ORDERS AS FOLLOWS:

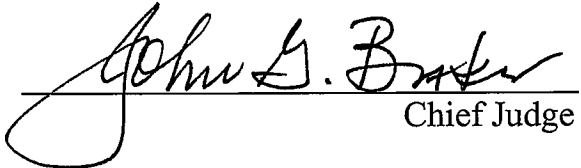
(1) The Star's Request for Evidentiary Hearing Under Ind. Admin. R. 9(I)(2) is DENIED.

(2) Appellee's Motion to Seal File/Motion That Further Pleadings Be Filed Under Seal is DENIED.

(3) Pursuant to Admin. R. 9(G), the records in this case shall continue to be excluded from public access.

(4) The Clerk of this Court is DIRECTED to post this Order on the Indiana Courts Website where this Court's opinions are posted.

ORDERED this 4th day of May, 2007.


Chief Judge

Vaidik, Barnes, J.J., Garrard, Sr.J., concur.